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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

**MILLER AVENUE PROFESSIONAL  
AND PROMOTIONAL SERVICES,  
INC.,**

**Plaintiff and Appellant,**

**v.**

**CHARLES A. KOSS et al.,**

**Defendants and Respondents.**

**MODIFICATION: NO CHANGE  
IN JUDGMENT**

**A121128**

**(Contra Costa County  
Super. Ct. No. MSC03-00783)**

BY THE COURT:

It is ordered that the opinion filed herein on September 25, 2009 be modified as follows:

In the last paragraph on page 10, following the words “in lieu of the July trial date,” the sixth, seventh and eighth sentences (which continue onto page 11) are deleted, and the following sentences are substituted in their place: “Koss’s counsel advised the court that after the July 2007 trial date had been continued, he told Coy (whom he did not represent) that Coy did not have to appear as scheduled. Counsel did not recall whether he ever informed Coy of the new trial date, but he took no steps to secure Coy’s attendance at the December trial and he did not tell MAPPS’s counsel he would do so. The trial court reasonably concluded that Coy had not been properly subpoenaed for the

December 2007 trial and that Koss's counsel had made no representation and had taken no action that would obviate the need for a subpoena to secure Coy's attendance."

At the end of the first full paragraph on page 11, ending with the words "on that basis," the following text is added as footnote 3 of the opinion: "In its petition for rehearing, MAPPS suggests that information about Coy's testimony was presented to the trial court in proceedings that were not transcribed by the court reporter. This court has previously denied MAPPS's "Motion for Order to Have the Superior Court Settle [a] Dispute Over an Omission in the Record." But even if we had granted that motion and accepted MAPPS's proposed narrative of the missing proceedings, that narrative did not include a description of the likely substance of Coy's testimony."

This modification does not effect a change in the judgment.

The petition for rehearing is denied.

Date \_\_\_\_\_, P.J.